University of Pennsylvania Law Review
Vol. 53 No. 7, Vol. 44 New Series (Jul. 1905)

"Notes on Recent Leading Articles in Legal Periodicals" pp. 460-464

tions between the states and the United States and *vice versa*. With respect to any one of these important points we venture to suggest that no better book can be found. *W. W.*

THE LAW OF TOWNSHIPS AND THE RIGHTS AND DUTIES OF TOWNSHIP OFFICERS IN PENNSYLVANIA. By WILLIAM TRICKETT, Dean of the Dickinson School of Law. Pp. xvi+565. Philadelphia: T. & J. W. Johnson & Co. 1905.

In this volume, which, to use the words of the author, "attempts for the first time, possibly, to collate the law with respect to townships in Pennsylvania," Mr. Trickett, following the general plan of his work on the law of boroughs in Pennsylvania, has given to the Pennsylvania lawyers in whose practice questions relating to the subject of the volume arise a compilation of statutes and cases which should prove of great value to such practitioners and of which he must often have felt the need.

The book treats of the formation and division of townships, election districts, and school districts; the classification of townships under the Acts of April 28, 1899, and May 11, 1901; the powers of a township; the questions of franchises, expenditures, and taxation in relation to the same; action by and against townships; the liability of townships upon contracts and torts, and the various rights and duties of township officers, the duty of supervisors in relation to roads and bridges being very fully considered.

A chapter of forms, the text of the Act of April 15, 1903, creating the State Highway Department, and a list of the special acts relating to townships in the several counties enacted before the adoption of the Constitution of 1874 have been added. *E. P. S.*

NOTES ON RECENT LEADING ARTICLES IN LEGAL PERIODICALS.

THE LAW QUARTERLY REVIEW.—April.

The Hague Court and Vital Interests. Sir Thomas Barclay. The object of the article is to examine the position of the Hague Court in connection with the scope of arbitration. We have first a slight sketch of the institution of the Hague Court; its "remaining like a marble monument, grand but useless," for three years, and then—all honor to the new world—the United States of America and Mexico gave it its first case. This example has been followed by Great Britain, France, Germany, Italy, Venezuela, and Japan. Yet "questions of national honor or vital interests" are still without the scope of compulsory arbitration, which is felt to greatly curtail the benefits to be hoped for from the Hague Court. In mentioning the action of the Senate of the United States in inserting the word "treaty" for that of "agreement" in the

recent case of the arbitration treaties, the author was probably not aware that the Senate was making no new claim of power, but was simply keeping to the safe and, for it, the only possible road in the matter, and that, therefore, it will not be possible for them to reconsider their action, but that it will be a very easy matter to secure the consideration of arbitration treaties properly presented.

Contingent Future Interests After a Particular Estate of Freehold. Albert Martin Kales. The writer endeavors to ascertain what ground the cases give for the assertion that, without the aid of statutes, contingent remainders are no longer destructible.

First the interests are classified, then named, then the extent to which they are recognized as legal estates noted. In conclusion the author says: "It is submitted, then, that in any American jurisdiction, even though its land laws may be founded upon those of England, and though there may be no contingent remainder act in force, yet if neither actual decision nor the practice of conveyancers has settled the law to the contrary, it may fairly be contended that there is practically no such future interest as a contingent remainder; that is, there is no rule of law which says that a future springing interest, after a particular estate of freehold which may be turned into a vested remainder, or take effect in possession *eo instante* upon the termination of the particular estate, must fail entirely unless it does so."

Notes on Maine's Ancient Law. Sir Frederick Pollock. We are here given some rather fragmentary but interesting notes on the Antiquity of the Roman Law; Customary Law in Homer; Early Forms of Law; Written and Unwritten Law; Early Codes; English Case Law and Fiction; and the Law of Nature and Jus Gentium and Equity.

MICHIGAN LAW REVIEW.—April.

The Power of the Senate to Amend a Treaty. B. M. Thompson. The value of a discussion upon such a point depends entirely upon the width of view and absence of partisanship displayed by those who discuss it. Unfortunately, both are absent from this article. No one can read such articles, written apparently with a feeling of what the author, to use his own spelling of the word, would probably call "peek," without recalling Washington's warning against the dangers into which party spirit would inevitably lead us.

The Liability of Water Companies for Fire Losses. Edson R. Sunderland. Premising that municipalities are not liable for such losses, the question is asked, "Does the same immunity attach to a private corporation under contract with the municipality to provide water for general fire purposes?" Between the property owner and the company on a direct contract the liability is established, but lack of privity has been held to be a defence where the individual sues on a contract between the city and a corporation. Privity, however, is not always essential for such suits. Some of the courts hold that the contracts of the municipality are made "for the public as composed of individual persons," and that, therefore, the city is but the agent of the public. Mr. Sunderland approves of this "very sensible and reasonable view." The courts being driven to take this view by force of legislative action, or clauses in the contract, took refuge in the second of the requisites, viz., absence of duty or obligation owing from the city to the property owners. Such a duty being requisite, the cases are conceded to be rightly decided which refuse a recovery, though the question of a duty to the property owners by the city might be raised. If such a duty is not a requisite, and this is thought to be the better rule, the cases seem to be wrongly decided. In the able discussion of these cases we are led to see, before the fact is called to our attention by the author, that the

question is one phase of the larger question respecting the right of a third person to sue upon a contract. It affords some very interesting material for the further illumination of that obscure region of the law.

Curb-Stone Patent Opinions. Dwight B. Chever. A number of important questions are asked and given what the author calls "off-hand" replies. These replies, however, are very clear, direct, and to the point, and seem to make a very good primer for the ordinary patentee, who would probably be irremediably confused if sent to the decisions for the law upon the subject.

YALE LAW JOURNAL.—April.

Federal Control of Corporations. Thomas Thacher. At the outset we are told that "this object not being within the lawful field of Federal action, legislation to this end would be unjustifiable; but yet the courts could hardly declare it void." Then we are asked the pertinent question, "Are we ready to increase the powers of the Federal Government and diminish the powers of the states? To state the question is to answer it." It is to be hoped so unless "we are willing to bid farewell to the fundamental theory of the Federal Constitution and to call the wisdom of the fathers folly." But is not this being already done every day? The folly of the fathers, the wisdom of the newest comer, is preached to us upon every side. Mr. Thacher regards the proposition as "a tremendous change towards centralization and a long step towards Federal socialism."

Judicial Legislation in New York. Wilbur Larremore. The interest of this paper is not confined to those who practise in the courts of New York. "Judge-made law" has been heard of in other forums. But in spite of Mr. Larremore's examples of the viciousness of this tendency it does not seem wholly an evil that "our vast accumulation of case law tends to dwindle in authority and assume the virtual status of opinions of the jurisconsults under the system of the civil law." Indeed, to some this may seem the very best result that could be attained.

AMERICAN LAW REVIEW.—May-June.

The Code of Hammurabi and American Law. Owen B. Jenkins. The discovery of a code of laws dating back to 2285–2242 B. C. has naturally excited much attention, not only from the legal world, but from all classes of persons. Mr. Maxcy's account of this interesting document is vivid, and he seems to have caught the spirit of the old code more completely than anyone who has as yet described it. He says: "It is purely a state document, like our own statute books, attending strictly to the duties of the state as a conservator of the public order and dispenser of justice between citizens, yet containing evident recognition of the church in, *inter alia,* its references to 'votaries' who were religieuses. Crime is not portrayed as a sin against the gods to be cleansed from the sinner by a sacrifice to an outraged divinity. It is punished as an offence against public order entitling the community in self-protection to chastise the criminal. There is an astonishing absence from the code of all theological or even ceremonial law."

Hammurabi is shown to have had a more just conception of the "varying force with which it" (the law) "meets the poor and the rich." He expressly decrees that offenders shall pay for the same offence different fines, levied on a sliding scale according to the depth of the offender's pocket-book." Legal charges, too, were scaled down to the limits of the poor man's purse; but the reason for this greater

apparent justice we find in the attitude of the law towards the men it affected. There was no theory of equality under the law, therefore it was not necessary to treat men as if they were equal. The apparent fault in our law comes from the attitude we have taken that the law is made for the simple citizen who may be either rich or poor, for the one is the equal of the other; it is the man who matters, not what he has. Mr. Jenkins ends with a glowing tribute to the wisdom of Hammurabi as exemplified in his code.

The Influence of the Bar in the Selection of Judges throughout the United States. Simon Fleischman. The author prepared for the writing of this article by formulating six questions which he propounded to six lawyers in each state and territory in the Union—three Democrats and three Republicans. A synopsis of the answers given is printed at the end of the article, the paper itself giving the conclusions drawn from these replies. Suggestions are also made that the bar should exercise as much influence as possible in the selection of judges; the requirements for admission should be raised; executive and judicial departments should be separated absolutely; salaries where grossly inadequate should be raised; objectionable nominees should be strongly opposed by the bar, etc. The appendix, with its synopsis, forms a very valuable addition to the paper.

Sovereignty and the Modern State. Noble C. Butler. The slow passing of the idea of sovereignty, which, from its authoritative statement and the mechanical perfection of the form of that statement, has so long enthralled the mind of the American and English lawyer, is signalled by the articles of this class which appear every now and then in the legal periodicals. They are usually very good and very bright articles, and this paper is no exception to the rule, if it is not even better than the most of them. The shadow of Hobbes and Bentham and Austin is passing, although it may well be that the average lawyer is as unconscious of the greater brilliancy of the legal atmosphere in which he dwells now as he was of the shadow under which the master minds of his profession chose to keep his chosen field. James Wilson was probably the first American to expose the fallacy of the definition of sovereignty as it was held in [illegible] and as it has ever since been defined. Those who are endeavoring to define it at this time might find his exposition profitable reading.

THE COLUMBIA LAW REVIEW.—May.

Do We Need a Philosophy of Law? Roscoe Pound. After noting that the common law wherever and whenever it has come in conflict with other legal systems has absorbed and assimilated those other systems out of existence or absolutely displaced them, we find the reason for this fact stated to be that hitherto the peoples have "been with it." But now upon examination of the digests we find decision after decision which runs directly contrary to the trend of the times, the thought of the people. Certain legislation has been decided upon by the people, and after careful formulation has been given to the legislatures, which in conformity to their will have enacted the requisite laws. To these laws the courts have refused to give effect; it may be in strict conformity to the legal development of the law as it has come down to them, as Mr. Pound says, but, also as he says, not in conformity with that reason which is the life of the law. The people understand that the courts are established to administer the law, and when they find that the courts refuse to give effect to law after law which they have made, and which they have decided to be

necessary to their well-being, that action arouses a deep-seated and bitter resentment. This feeling of the people towards the common law is felt by Mr. Pound to be the greatest danger that that law has to face. Most unexpectedly he turns to the law schools as the possible savers of the situation. They are to teach the new philosophy of the law, one better suited to the times and the temper of the people than the smooth syllables of Blackstone or the rougher utterances of Coke. The law schools may do well to note the new burden laid upon them and their responsibility for the future well-being of the common law.

Agency by Estoppel. John S. Ewart. Mr. Ewart here replies to Professor Cook, whose interesting article on "Agency by Estoppel" has attracted the attention of those holding a different point of view. His opponent is also able and interesting, and his argument is logical and consistent, but in naming himself an 'estoppel sinner' and in his answer as a whole he has shown rather the eagerness of the man with a thesis to sustain than the calmness of one who desires a dispassionate examination of the matter under discussion. To one not concerned it would seem that those in controversy will first need to agree as to the real point at issue if further discussion is to be of value.

Money Paid Under Mistake of Law. Frederic C. Woodward. The "rule that money paid under a mistake of law is not recoverable" is attacked on the ground that "the reasons for the rule are unsound." We are then shown what encroachments upon the rule have been made, —these being largely in the Southern and Western States,—and an examination is made as to the principle that ought to be applied. Mr. Woodward concludes by urging upon the courts and legislatures "That without abrogating the present rule denying the recovery of money paid under mistake of law, but by confining its application to cases in which the money appears to have been paid with the consciousness of a doubt as to the law, the hardship of the rule will be minimized if not entirely eliminated, and the whole law of relief from mistake placed upon a basis of sound and consistent policy."

THE GREEN BAG.—May.

The Law's Delays. Can They be Obviated? This issue of the *Green Bag* is entirely devoted to a consideration of this subject. William Lambert Barnard gives "A Summary of Conditions in the United States;" James M. Gwin, "Delay in Civil Procedure in Chicago;" B. Newton Crane, "The Modern English Procedure;" and some fifteen most able men combine to write upon "The Applicability of English Methods to Conditions in the United States." They generally seem to concede that, from Mr. Crane's statement of the case, the English methods would be a great improvement if applied in this country. The great difficulty is that Mr. Crane's view of the case may not be absolutely flawless. The value of this concensus of opinion would be greatly enhanced if it could be perceived that the gentlemen had studied the English methods for themselves. This does not seem to have been the case with the possible exception of Mr. Westernhaver, of Ohio, and Mr. Elder, of Massachusetts. Some of Mr. Westernhaver's suggestions seem to be most applicable and to be especially the outcome of his own study of the situation. Mr. B. H. Conner gives a paper on "Celerity in Commercial Cases in France," which incidentally gives a view of one of the most interesting courts in that country. Mr. Henry Burnham Brooks writes on the situation in Italy." It need not be said that when the *Green Bag* devotes so much space to investigating such a subject there will be found in the matter given very much that is valuable, interesting, and of more than ephemeral importance.